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No. 91-1774

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT LILLIS, LEONARD PASTORE, ANTHONY DILULLO and MARY FISH-MACDONALD,
Petitioners,

v.

ANTHONY GOLINO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONERS' REPLY MEMORANDUM

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. RESPONDENT MISTAKENLY ASSUMES THAT ISSUE PRECLUSION IS UNAVAILABLE IN MALICIOUS PROSECUTION CLAIMS WHEN THE ACCUSED HAD NO 'ACCESS' TO THE POLICE FILE 1

II. RESPONDENT MISTAKENLY ASSUMES THAT IMMUNITY FOR ARRESTING OFFICERS IS UNAVAILABLE IN MALICIOUS PROSECUTION CLAIMS WHEN THE REVIEWING JUDGE RELIES ON INCOMPLETE OR FALSE INFORMATION IN A POST ARREST HEARING 3

TABLE OF AUTHORITIES

CASES Page

Keeney v. Tamayo-Reyes, 60 U.S.L.W. 4339 (U.S. May 4, 1992) (No. 90-1859) 3
Malley v. Briggs, 475 U.S. 335 (1986) 4
United States v. Williams, 60 U.S.L.W. 4348 (U.S. May 4, 1992) (No. 90-1972) 3

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PETITIONERS' REPLY MEMORANDUM

I. RESPONDENT MISTAKENLY ASSUMES THAT ISSUE PRECLUSION IS UNAVAILABLE IN MALICIOUS PROSECUTION CLAIMS WHEN THE ACCUSED HAD NO 'ACCESS' TO THE POLICE FILE

Respondent urges this Court to decline an opportunity to establish a clear standard in Section 1983 actions for avoiding relitigation of prior state court probable cause findings. In doing so, he relies on the fact that although the state court finding in question was issued following a nine day, adversarial hearing he was "not allowed to conduct discovery of the State's investigative file." Resp. Br. at 18. This argument is flawed in two respects.

First, respondent confuses the issue of guilt or innocence with the precise issue for which preclusive effect is

sought in this case—*probable cause for arrest*. Whether or not full blown "discovery" would be deemed necessary to assure a "full and fair opportunity" to litigate guilt, is immaterial to the question posed here; namely, whether the 1984 post-arrest hearing in which each of his challenges to police veracity was raised and considered provided a "full and fair opportunity" to litigate a reasonable belief in the sufficiency of the state's charges.

Secondly, respondent mistakenly assumes that had the state court hearing been conducted in a manner beyond that required under state law and due process "probable cause would not have been found." Resp. Br. at 19. However, nowhere in the entire record in this case has respondent pointed to a *single fact*, that would have changed the outcome of the state court's post-arrest probable cause finding, *except* the nature of respondent's blood type. And as indicated in petitioners' initial brief, that fact was not known to anyone at the time probable cause was determined (43 JA). When asked specifically at argument on the motion for summary judgment in the trial court what facts, other than the blood type of respondent, that if known at the probable cause hearing would have changed the outcome, respondent's counsel was unable to identify any. Moreover, respondent ignores the fact that in the previous proceeding, each of the matters allegedly omitted from the prosecution's initial submission in support of probable cause (with the exception of the unavailable blood type information) was brought to the attention of, and considered as true by the judge during the course of the nine day hearing, particularly through the accused's cross-examination and his written Offer of Proof (442-45, 446-80, 493-96 JA).

Although respondent here would obviously have preferred a greater opportunity to have dissuaded the state court judge, he does not now claim that the state's evidence was perjurious nor, with the exception of blood type, does he rely on one piece of evidence that would have led to a different result.

This Court recently has restated its long-standing position that federal courts must give due regard to state court findings, particularly where "scarce judicial resources" are used to "duplicate factfinding" available to litigants in the state courts. *See Keeney v. Tamayo-Reyes*, 60 U.S.L.W. 4339, 4341 (U.S. May 4, 1992) (No. 90-1859). Further, this Court recently has held in the context of criminal charges by indictment, that a grand jury's determination of probable cause is valid even when the prosecution deliberately withholds from the grand jury what it knows to be "substantial" exclupatory information. *United States v. Williams*, 60 U.S.L.W. 4348 (U.S. May 4, 1992) (No. 90-1972). Thus there is no legal basis for respondent's suggestion that a state court's finding of probable cause for arrest is unworthy of federal full faith and credit whenever the prosecution "intentionally" withholds "obviously exculpatory information. . . ." Resp. Br. at 27.

Respondent has failed to refute the importance and substantiality of the full faith and credit issue presented here for review. Accordingly the decision below merits review.

II. RESPONDENT MISTAKENLY ASSUMES THAT IMMUNITY FOR ARRESTING OFFICERS IS UNAVAILABLE IN MALICIOUS PROSECUTION CLAIMS WHEN THE REVIEWING JUDGE RELIES ON INCOMPLETE OR FALSE INFORMATION IN A POST ARREST HEARING

Petitioners seek review of the qualified immunity issue decided below based, in part, on the importance in malicious prosecution claims of considering, as a matter of law, the impact of a so-called "corrected" arrest warrant affidavit; that is, whether or not a hypothetical affidavit conforming to what the claimant maintains *should* have been initially set forth by the police, would nonetheless support an "arguable" or "reasonable belief" in the existence of probable cause for arrest under the

standard of *Malley v. Briggs*, 475 U.S. 335 (1986). In opposing petitioners' request for review of this issue, respondent asserts:

> . . . 'correcting' the affidavit at this point . . . makes no difference to [petitioners'] argument as the state judge at the hearing did not have the benefit of the petitioners' version of the 'corrected affidavit' in front of him.

Resp. Br. at 24.

Respondent's argument thoroughly misapprehends the legal standard adopted by this Court in *Malley*. For even if their submission in support of probable cause contained material omissions or even falsehoods, arresting officers are nonetheless qualifiedly immune so long as a "corrected" version of their submission would sustain *a reasonable officer's belief* in the existence of probable cause at the time of the arrest.

Thus, the proper test under *Malley* is not, as respondent contends, whether the judge conducting the post-arrest probable cause hearing has the "benefit" of the so-called "corrected" affidavit, but whether, even if probable cause had been lacking, the "corrected" version would still support a reasonable official belief in the existence of probable cause for arrest.

Respondent also distorts petitioners' argument on the legal significance to the qualified immunity defense of a state court's post-arrest probable cause finding. Contrary to respondent's characterization, petitioners do not contend that a state court's post-arrest finding of probable cause breaks the "causal chain of liability . . . under § 1983." Resp. Br. at 22. Instead, petitioners urge that the objective rreasonableness of the arresting officer is established when, among other things, a judge makes a finding of probable cause following an adversarial hearing in which the officers' veracity is thoroughly challenged through cross-examination.

That respondent misconstrues petitioners' argument is further demonstrated by his assertion that the alleged defects in the arrest warrant affidavit "utterly undermined" the *pre-arrest* "determination of probable cause." Resp. Br. at 26. However, respondent's operative claim in this case is malicious prosecution—the reasonableness of petitioners in presenting and pursuing criminal charges—not wrongful or false arrest. Thus the quality or sufficiency of the submission presented to the judge *issuing* the arrest warrant is entirely immaterial to the question presented for review; whether or not the arresting officers had an "objectively reasonable" basis to rely on the probable cause finding of a judge following both the arrest and an adversarial hearing.

For these reasons, the questions presented in connection with petitioners' qualified immunity defense warrant review.

Respectfully submitted,

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